

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**A.B., Appellant**

**and**

**U.S. POSTAL SERVICE, HENDERSON POST  
OFFICE, Henderson, NC, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 08-814  
Issued: August 4, 2008**

*Appearances:*

*Dale Snider, for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 23, 2008 appellant, through her representative, filed a timely appeal of the Office of Workers' Compensation Programs' November 20, 2007 merit decision and a nonmerit decision dated December 13, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merit and nonmerit issues of this case.

**ISSUES**

The issues are: (1) whether appellant has met her burden of proof in establishing that she sustained a recurrence of disability on September 14, 2007 causally related to her February 2, 2004 employment injury; and (2) whether the Office properly refused to reopen appellant's case for further consideration of the merits pursuant to 5 U.S.C. § 8128(a).

**FACTUAL HISTORY**

On February 2, 2004 appellant, then a 43-year-old rural carrier, filed a traumatic injury claim alleging that she developed lower back pain as a result of pulling packages into the front

seat of her vehicle. The Office accepted her claim for lumbar strain on March 15, 2004. Appellant returned to regular duty on May 26, 2004.

Beginning in February 2006, appellant submitted evidence regarding her current low back condition. On March 14, 2006 Dr. Stephen M. David, a Board-certified orthopedic surgeon, noted appellant's previous work injury and found that a March 10, 2006 magnetic resonance imaging (MRI) scan revealed facet joint synovial hypertrophy L4-5 consistent with facet joint arthropathy and spondylolisthesis. He recommended L4-5 epidural injection. In a letter dated March 31, 2006, the Office requested additional factual and medical evidence from appellant regarding her current back condition.

Appellant underwent an additional spinal MRI scan on August 29, 2007. In a letter dated September 25, 2007, the Office informed her that if she believed she had developed a recurrence of her low back condition she should submit additional medical evidence in support of her claim. Appellant responded on October 3, 2007 and stated that she had continued to experience pain since her February 2, 2004 employment injury. She noted that she was currently experiencing radicular pain in the right leg and attributed her condition to her ongoing employment duties of standing, bending, lifting and twisting.

In a report dated September 14, 2007, Dr. David noted appellant's accepted February 2, 2004 employment injury and stated that her diagnosed condition was L4-5 degenerative spondylolisthesis exacerbated by her work injury. He noted that appellant had recently developed recurrent symptoms of increased pain. Dr. David found an antalgic gait as well as tenderness over the right sciatic notch and right posterosuperior iliac spine and limited range of motion of the lumbar spine. He noted decreased sensation in the L5 nerve root distribution on the right. Dr. David stated, "She is having exacerbation after the work injury a couple of years ago. Nerve root compression is significant." He recommended an epidural injection.

By decision dated November 20, 2007, the Office denied appellant's claim for recurrence of disability beginning September 14, 2007. It found that appellant failed to submit sufficient medical opinion evidence to establish a causal relationship between her diagnosed condition and her accepted employment injury.

Appellant filed a recurrence of occupational disease on November 29, 2007 alleging that she continued to perform her regular duties as a rural carrier. She stated that the "continuation of lifting, twisting, turning, standing and sitting resulted in her current pain and need for surgery. Appellant alleged her condition was "two discs rubbing together and cyst on spine pressing on nerve."

Appellant requested reconsideration of the November 20, 2007 decision on November 30, 2007.

By decision dated December 13, 2007, the Office declined to reopen appellant's claim for consideration of the merits. It noted that appellant had requested reconsideration and submitted a new claim for occupational disease which was not relevant to the issue of lack of medical evidence for which her claim for recurrence had been denied. The Office stated, "It should be

noted a new claim will be created for the Form CA-2 and it will be adjudicated under the new claim number.”<sup>1</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

A recurrence of disability is the inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment which caused the illness.<sup>2</sup> Where an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury. The burden includes the necessity of furnishing evidence from a qualified physician who, on the basis of a complete and accurate factual and medical history, concluded that the condition is causally related to the employment injury. Moreover, sound medical reasoning must support the physician’s conclusion.<sup>3</sup>

The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. In this regard, medical evidence of bridging symptoms between the recurrence of the accepted injury must support the physician’s conclusion of a causal relationship. While the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty.<sup>4</sup>

For each period of disability claimed, a claimant has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provided by the preponderance of the reliable probative and substantial medical evidence.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

Appellant submitted reports from Dr. David, a Board-certified orthopedic surgeon, addressing her current low back condition. On March 14, 2006 Dr. David reported appellant’s history of employment injury and diagnosed facet joint arthropathy and spondylolisthesis based on an MRI scan. He did not offer an explanation of how appellant’s current condition was due to the accepted February 2, 2004 employment injury. Dr. David did not offer any explanation of

---

<sup>1</sup> As the Office has not issued a final decision addressing appellant’s claim for a new occupational disease dated November 29, 2007, the Board will not address this issue for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>2</sup> 20 C.F.R. § 10.5(x).

<sup>3</sup> *Ricky S. Storms*, 52 ECAB 349 351-52 (2001).

<sup>4</sup> *Id.*

<sup>5</sup> *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

how the changes in appellant's diagnosed condition evolved or whether her condition was related to her employment injury. This report is not sufficient to meet appellant's burden of proof in spontaneous change in her injury-related condition nor does it demonstrate that the claimed recurrence was caused, precipitated, accelerated or aggravated by the accepted injury. Therefore, this report is not sufficient to meet appellant's burden of proof.

Dr. David submitted an additional report dated September 14, 2007. He noted that appellant had symptoms of increased pain and described her accepted employment-related injury and resulting condition. Dr. David stated, "She is having exacerbation after the work injury a couple of years ago. Nerve root compression is significant." While he opined that appellant's current condition was an "exacerbation" of her 2004 work injury, he did not offer any explanation of how he reached that conclusion. Dr. David did not discuss appellant's allegations that her current condition was the result of her additional job exposures and did not explain why he believed that her current condition was a spontaneous worsening of her accepted work-related condition. Due to these deficiencies, this report is not sufficient to meet appellant's burden of proof in establishing a recurrence of disability and the Office properly denied her claim.

### **LEGAL PRECEDENT -- ISSUE 2**

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,<sup>6</sup> the Office's regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.<sup>7</sup> When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.<sup>8</sup>

### **ANALYSIS -- ISSUE 2**

In support of her November 30, 2007 request for reconsideration of the Office's November 20, 2007 decision denying her claim for a recurrence of disability causally related to her February 2, 2004 employment injury, appellant submitted a new claim for an occupational disease. As she has attributed her current condition to additional employment exposures of lifting, twisting, turning, standing and sitting, this claim form fails to provide relevant new evidence supporting a claim for a spontaneous recurrence of disability due to the February 2, 2004 employment injury. Instead, as the Office properly noted, this claim form requires additional development of the alleged occupational disease. An occupational disease or illness means a condition produced by the work environment over a period longer than a single workday or shift.<sup>9</sup> As claims for a recurrence of disability and a new occupational disease are by

---

<sup>6</sup> 5 U.S.C. §§ 8101-8193, § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(2).

<sup>8</sup> 20 C.F.R. § 10.608(b).

<sup>9</sup> 20 C.F.R. § 10.5(q).

definition mutually exclusive, appellant's submission of a new occupational disease claim cannot constitute relevant and pertinent new evidence in support of her claim for a recurrence of disability due to the February 2, 2004 employment injury.

**CONCLUSION**

The Board finds that appellant has not submitted the necessary medical opinion evidence to establish that she sustained a recurrence of disability due to her February 2, 2004 employment injury in 2006. The Board further finds that the Office properly denied appellant's request for reconsideration on the grounds that she failed to submit relevant and pertinent new evidence.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated December 13 and November 20, 2007 are affirmed.

Issued: August 4, 2008  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board